In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 996 AND No. 1504 MISC.

ARTHUR F. BURHOE, PETITIONER

v.

HON. ANTHONY JULIAN AND GARRETT BYRNE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

BRIEF FOR THE RESPONDENT JULIAN IN OPPOSITION [1]

OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus (App. 22)[2] is unreported. The memorandum and order of the district court (App. 17–22) is reported at 289 F. Supp. 408.

JURISDICTION

No. 996 (petition for a writ of certiorari)—The order of the court of appeals was entered on November 4, 1968 (App. 22). The petition for a writ of certio-

[1] Judge Julian requested the Department of Justice to appear in this action.

[2] "App." refers to the appendix pages of the combined petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus.

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rari was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No. 1504 Misc. (Motion for leave to file a petition for a writ of mandamus)—The motion for leave to file a petition for a writ of mandamus was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1651.

QUESTION PRESENTED

A single judge district court dismissed petitioner's action to enjoin a state prosecution, determining that the federal constitutional issue raised was plainly unsubstantial. The question presented is whether, after expiration of the time within which to appeal, mandamus will lie to review such a dismissal.

STATEMENT

Petitioner commenced this action in the United States District Court for the District of Massachusetts to enjoin the District Attorney (a respondent in No. 996) from prosecuting him under a criminal indictment then pending in the Suffolk County Superior Court. The gravamen of the complaint was that, since petitioner was bound over to the Superior Court after proceedings had been begun against him in the Municipal Court, the prosecution in the Superior Court would subject him to double jeopardy. Petitioner acknowledged that the Superior Court prosecution was sanctioned by Massachusetts General Laws, c. 218, § 30, which, *inter alia,* authorizes the Municipal Court to "commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction." Petitioner asserted, however, that

the state statute as applied violated the Fifth and Fourteenth Amendments to the United States Constitution. He requested the convening of a three-judge court to consider the constitutional issue.

On September 6, 1968, the respondent single district judge dismissed the complaint, determining that petitioner's "claim of double jeopardy is frivolous and raises no substantial federal question" (App. 21). No appeal to the court of appeals was taken from that judgment within the 30-day period period prescribed by Rule 4(a) of the Federal Rules of Appellate Procedure. On October 24, 1968—18 days after the appeal period had expired—petitioner filed a petition for a writ of mandamus in the court of appeals, seeking to compel the district judge to refer the complaint to a three-judge court. On November 4, 1968, the court of appeals summarily denied the petition for want of jurisdiction (App. 22).

In this Court, petitioner seeks (1) review of the court of appeals' denial of his petition for mandamus, or (2) a writ of mandamus from this Court granting the relief that the court of appeals denied.

ARGUMENT

The convening of a three-judge court under 28 U.S.C. 2284 is not required where the constitutional question sought to be raised is "plainly unsubstantial", either because it is "obviously without merit" or because it is foreclosed by previous decisions of this Court. *Ex parte Poresky,* 290 U.S. 30, 32; see *Bailey* v. *Patterson,* 369 U.S. 31, 33; *Bell* v. *Waterfront Commission,* 279 F. 2d 853, 857 (C.A. 2). More-

over, when, as here, a single district judge has entered a final order dismissing the complaint on the ground that the constitutional issue is unsubstantial, the proper avenue of review is an appeal to the court of appeals under 28 U.S.C. 1291. *E.g., Eastern States Petroleum Corporation* v. *Rogers,* 280 F. 2d 611, 613, n. 7, 615–616 (C.A.D.C.), certiorari denied, 364 U.S. 891.

Since petitioner had not prosecuted an appeal from the district court's dismissal of his complaint within the time specified by the Rules, the court of appeals properly denied his petition for mandamus there. Mandamus will lie only where there is not an adequate remedy by appeal. *Ex parte Fahey,* 332 U.S. 258, 260. Similarly, review of the district court's action is not available by seeking the issuance of a writ of mandamus in this Court. See *Ledford* v. *Curran,* 366 U.S. 948; *Lion Mfg. Corp.* v. *McGuire,* 373 U.S. 920.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted.

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